"Apollo" brand essence of chicken in the area described in the contract. In effect, the plaintiffs as manufacturers give the defendants as exclusive distributors in that area a monopoly in the sale of the plaintiffs' product. The relation between the plaintiffs and the defendants is that of vendor and purchaser. Clause 3 of the contract reads:

"We agree to sell you and you agree to purchase from us, Apollo brand essence of chicken at our price c.i.f. ocean ports in your territory, as of the date of receipt of your order or orders."

The relation between the plaintiffs and the defendants is not that of principal and agent. The defendants are not authorized to bring the plaintiffs as manufacturers into contractual relations with persons purchasing "Apollo" chicken essence from the defendants. That being so, the principle laid down in the passage cited from 8 *Halsbury's* Laws of England, 3rd edition, at page 157, is applicable. And as the parties stipulated that the contract was to continue for five years from the 1st May, 1957, I hold that the contract could not be terminated before the expiration of that period. The third claim set up by way of counterclaim accordingly succeeds.

It now remains for me to assess the damages. The price paid by the defendants was $78 per carton of 3½ oz. bottles and they sold each carton for $150. They made a profit of $65 per carton according to the evidence given by Teo. Their sales amounted to 500 cartons a month on the average. The contract was terminated about 20 months before the expiration of the term of 5 years fixed by the contract. In my opinion the defendants could have made a profit of at least $650,000 as exclusive distributors of "Apollo" chicken essence during the period of 20 months. The unlawful termination of the contract by the plaintiffs deprived the defendants of this profit. I therefore assess the damages at $650,000.

The result is that for the reasons given above I give judgment for the plaintiffs for $31,690.53 on their claim and judgment for the defendants for $694,495.55 on their counterclaim, and I reserve the question of costs.

Order accordingly.

Solicitors: *M. B. Brash*; *Drew & Napier.*

LIN NYUK CHAN v. WONG SZ TSIN

[F.C. (Thomson L.P., Wee Chong Jin C.J. (Singapore) and Wylie C.J. (Borneo)) February 4, 1964]

[Jesselton — Federal Court Civil Appeal No. 45 of 1963]

Landlord and Tenant — Tenancy agreement — Term as to rent payable — Whether uncertain — Whether enforceable.

Land Ordinance (Sabah Cap. 68), ss. 88, 94, 116 — Whether contract otherwise valid and enforceable rendered void by non-registration.

Specific performance — Agreement part performed — Entry into possession — Agreement vague on subsidiary matters — Whether specifically enforceable.

The appellant, the tenant of business premises entered into a "tenancy agreement" with the respondent the owner of the said premises on November 25, 1960 for a period of 15 years from January 16, 1961. The provision for rent read "....paying therefor the monthly rent of $650. Subject to variation upwards or downwards as the case in accordance with the market rental value of similar shophouses along Beach Street, Jesselton (particularly the shophouse adjoining the said demised premises) to be payable by the 15th day of every month." The appellant went into possession and paid $650 monthly rent from February to December 1961. In January 1962 correspondence ensued between the parties as to the variation of rent and the registration of a lease in accordance with the original agreement. The appellant commenced proceedings in November 1962 in the High Court for an order that the voluntary offer of increase of rent from $650 to $680 was a fair current rent, that a new lease embodying the same terms and conditions in the original lease be made in accordance with form XVI of the Land Ordinance and registered under section 104 of the said Ordinance by way of specific performance. The trial judge gave judgment against the plaintiff on the ground that the provision with regard to varying the amount of rent was so uncertain as to make the agreement unenforceable by an order for specific performance. On appeal to the Federal Court the only issues were (i) the amount of rent payable at that stage of the term of the tenancy and (ii) whether the "tenancy agreement" was valid and enforceable by way of specific performance.

Held: (1) the rent fixed in the agreement was not uncertain but was fixed at $650 at the outset with a provision for subsequent variation;

(2) having regard to all that was provided for in the lease there was nothing so fundamental as to deprive the appellant of a decree of specific performance especially when the appellant had been in possession for nearly three years and was still in possession without any attempt by the landlord to evict him.

Observations on sections 88, 94 and 116 of the Land Ordinance (Sabah), the Land Titles Ordinance, 1956 (Singapore) section 27; Selangor Registration of Titles Regulation 1891 section 4.

Cases referred to: —

(1) *Attorney-General for Ontario* v. *Canadian Niagara Power Co.* [1912] A.C. 852.

(2) *Watcham* v. *East Africa Protectorate* [1919] A.C. 533, pp. 538 - 540.

(3) *Gregory* v. *Mighell* (1811) 18 Ves. 328; 34 E.R. 341.

(4) *Parker* v *Taswell* (1858) 2 DcG. & J. 559; 44 E.R. 1106.

(5) *Sanderson* v. *Cockermouth & Workington Railway Co.* (1849) 11 Beav. 497; 50 E.R. 909.

(6) *Hart* v. *Hart* (1881) 18 Ch. D. 670.

(7) *Abigail* v. *Lapin* [1934] A.C. 491.

(8) *Haji Abdul Rahman* v. *Mohamed Hassan* [1917] A.C. 209; 1 F.M.S.L.R. 290.

FEDERAL COURT.

W. K. Loo for the appellant.

Shelley Yap Yeok Siew for the respondent.

Cur. Adv. Vult.

Thomson L.P.: I have had the benefit of reading Sir Campbell Wylie's judgment with which I agree and to which I do not wish to add anything.

Wylie C.J. (Borneo): The appellant is the tenant of business premises belonging to the respondent situated in Beach Street, Jesselton. On 25th November, 1960, the parties executed a document called a "tenancy agreement" and expressed in the form of an agreement except that it is stated that "the landlord lets and the tenants takes" the demised premises. The period of the tenancy is fifteen years from 16th January, 1961.

The only issue before the Federal Court was whether this agreement was valid and enforceable by way of specific performance. There were other issues before the High Court, but all except one were disposed of and are not raised again in this appeal. Consequently, I do not refer in this judgment to those issues. The issue undisposed of, and to which reference must be made, is the question of the amount of the rent payable at this stage of the term of the tenancy.

The provision for rent is in the following language —

"paying therefor the monthly rent of $650. *SUBJECT* to variation upwards or downwards as the case in accordance with the market rental value of semilar (*sic*) shophouses along Beach Street, Jesselton (particularly the shophouse adjoining the said demised premises) to be payable by the 15th day of every month."

The appellant went into possession under the agreement and on 20th February, 1961, he paid $325 to the respondent who gave a receipt which states that this sum is rent "from 16.1.61 to 31.1.61." On the same day, he also paid $650 which the receipt describes as rent "for February 1961". In each of the remaining ten months of 1961, he paid the same amount of $650 and received from respondent a receipt which describes the payment as rent for the appropriate month.

On 12th January, 1962, the respondent wrote to the appellant a letter in which, *inter alia,* she demanded immediate payment of $360 for sewerage rates for 1961 and payments of $30 a month for sewerage rates totalling $360 for 1962. There is nothing in the letter which suggests there should be any different amount paid as monthly rent.

The agreement provides that the landlord will pay all rates. Appellant's advocate replied denying liability for rates, but offering to pay "an increase of rent of $30 per month as from 1st day of January 1962". Respondent replied on 12th February, 1962, in the following terms, *inter alia*:—

"Payment of sewage (*sic*) rate by your clients need not be paid by them, as per the tenancy agreement made between us on 25.11.60. The agreement was made mutually and was not registered. However, since Government taxes levied on the premises are high, I have decided to raise the monthly rent, with effect from 1st January, 1962, to $800, and this increase is in accordance with the present market rental value."

The appellant's advocate wrote on 15th February stating that appellant was "unable to accept the increase" and arguing, by reference to rent of certain neighbouring shops, that an increase of rent was not justifiable. As to registration, the letter stated:—

"As the tenancy agreement executed on the 25th November, 1960, has not been registered with the Land Office, we are to inform you that you are required to deliver to our office within 3 days from the date hereof your lease of the land and building for registration with the Land Office as required in the Land Ordinance."

Further correspondence ensued, the salient features of which were a substantial difference of opinion as to what variation there should be in the rent by reason of the application of the formula in the agreement and a refusal by the respondent to accept payment of less than $800 a month rent except under protest. The respondent would not agree to registration of a lease in accordance with the original agreement, but did offer to agree to registration of a lease for a shorter term with an "option of renewal by both parties". The respondent also alleged that the appellant had originally promised to have the lease registered. The appellant's advocate continued to maintain that respondent should have the lease registered and threatened to commence proceedings for specific performance.

After correspondence on these lines had passed back and forth for some months, the appellant commenced proceedings in the High Court on 16th November, 1962, against the respondent claiming —

"(1) An order that the voluntary offer of increase of rent by the plaintiff from $650 to $680 is a fair current rent.

(2) That a new lease for the residue term of 15 years embodying same terms and conditions provided in the original lease be made in accordance with the form in Schedule XVI of the Land Ordinance.

(3) That the new said lease be brought to the Land Office by the defendant for registration in accordance with section 104 of the Land Ordinance.

(4) Costs."

The statement of claim alleged that the respondent is the lessor and the appellant the lessee of the demised premises, and referred to the agreement of 25th November, 1960, as "the lease agreement." Paragraph 3 of the statement of claim is as follows:—

"The monthly rent for the demised premises is $650 'subject to variation upwards or downwards as the case in accordance with the market rental value of similar shophouses along Beach Street, Jesselton (particularly the shophouse adjoining the said demised premises).'"

The statement of claim outlines the correspondence concerning sewerage rates and the claim by the appellant for an increased rent to which I have already referred, including the references therein to registration of a lease.

In the defence filed by the respondent, the execution of the "tenancy agreement" is admitted, but it is alleged that the agreement is not a valid document "in so far as it concerns 'the term of the lease for a period of 15 years' ". Alternatively, if the agreement is valid, certain breaches of the agreement by the appellant were alleged, but these allegations were all disposed of in the court below in favour of the appellant, and were not raised again in the course of this appeal.

Paragraphs 2 and 3 of the appellant's reply read as follows:—

"2. The plaintiff says that the lease executed between the parties is valid as between the parties themselves.

3. In the alternative, the plaintiff says that he is entitled to claim specific performance of the agreement by having it registered."

At the hearing, the only witnesses were the appellant and the respondent. The former gave some evidence about the rent of neighbouring shops, the latter gave none. In cross-examination, she stated that, after a year had elapsed, she did not consider the rent too low, but she asked for more rent because of the demand for sewerage rates. Later in her evidence she said she had made "verbal demands" for a rent of $800 before appellant offered to pay an extra $30 a month on account of the sewerage rates. However, this contradictory piece of evidence cannot be accepted, having regard to the nature of the correspondence concerning the sewerage rates, especially a reference in the respondent's letter of 12th February, 1962, to "the rent of $650 per month from January, 1961, and onward" being low and to the fact that "the amount of the rent was agreed" before the assessment was known. There is no suggestion in this correspondence that an increase of rent had been asked for on an earlier occasion.

At the close of the plaintiff's case, the court and the parties inspected the premises. The judge's notes contain this reference to the question of "a fair rent":—

"As to a fair rent comparison is made between various neighbouring shophouses whose owners inform us of the rents. They range from $700 — $720 — $900. Taking into account, position, area and general amenities I fix $715 as a fair rent. $715 is the mean between what the plaintiff and defendant suggested, that is, $680 and $750 respectively.'

On the resumption of the hearing the appellant offered to agree to a rent of $715, but the respondent refused to accept this offer.

The hearing was concluded on 29th April, 1963, and judgment reserved. On 10th May, 1963, judgment was given against the plaintiff on the ground that the provision with regard to varying the amount of rent was so uncertain as to make the agreement unenforceable by an order for specific performance. The judgment, for the first time in these proceedings, raises the question in the following terms:—

"It is clear to my mind that the parties have fallen into disagreement mainly because of the vaguely-worded clause as to the amount of rent so that they have been unable to agree on a fair rent to be paid from the 1st January, 1962. Now it is a fundamental rule in any tenancy agreement that the rent must be certain, or it must be so stated that it can afterwards be ascertained with certainty — see *Halsbury's* Laws of England, third edition, volume 23, page 538, paragraph 1196. It is no objection that the rent is a fluctuating amount provided that it can be ascertained as certain from time to time."

After referring to *Attorney-General for Ontario* v. *Canadian Niagara Power Co.*[1] the judge dealt with this point in these terms:—

"But can the rent be ascertained in the present case as certain on the 1st January, 1962? I do not think so. 'The market rental value of similar shophouses along Beach Street, Jesselton' is not an amount which, in my opinion, can be ascertained with certainty. There is, for example, no official scale of 'market rental value'.

If there is disagreement between the parties, as here, who is to decide? The High Court? The Jesselton Town Board? It is not at all clear and this uncertainty has caused the trouble between the parties. In my opinion this vague variation clause as to rent has the effect of rendering the agreement incapable of being enforced by a court order of specific performance. Nor do I think that the court has the power in the circumstances to order the parties to enter into a new lease for the residue of the term of fifteen years at a rent which the court considers to be a fair rent. It seems to me that as the rent was paid monthly this tenancy agreement is enforceable only as an agreement from month to month."

The difference in the language used in these two passages leaves me in some doubt as to whether the judgment is based on the view that there is no certain rent fixed in this agreement, and that therefore the agreement for a lease is unenforceable because it does not provide for a rent that is certain, or whether it is based on the view that, a rent having been fixed, the provision for variation is too vague to be enforceable and for that reason an order for specific performance of the agreement in favour of appellant should not be made. To determine this appeal, it is first necessary to decide which view of this provision in the agreement is correct.

The appellant in effect contends in his first ground of appeal that the rent is fixed at $650 a month, and that the provision for variation of the amount merely enables the rent to be adjusted from time to time according to market rental values because of the long term of fifteen years. He also contends that there is nothing uncertain about the provision for variation, because the extent of the variation is to be determined in accordance with variation in market rental values and that the amount of this latter

variation might be determined by agreement between the parties, by arbitration, or by the court. I assume that to amount to a submission that this is purely a question of fact which can be determined upon consideration of the relevant evidence either by the parties, or, failing agreement, by the court, or by arbitration, if the parties agree to arbitration. The respondent merely submitted that the rent provided for was uncertain and the appeal should therefore be dismissed.

In my judgment, what the parties have agreed to is a fixed rent of $650 a month from the outset and they have also agreed that in the future this amount of $650 is to be varied in accordance with the market rental value of similar shophouses in Beach Street. When it is so varied, the new amount will become the monthly rent, but, until it is so varied, the rent remains at $650. The intention of the language used is not, in my judgment, that there is no rent fixed for any particular month until the variation for that month has been established. "Market rental values" for shophouses do not normally jump about month to month to the extent that landlords and tenants seek to protect themselves from such a contingency. Indeed they are often leased for long periods, as this case illustrates, and the rent is usually fixed for some lengthy period. Even in the case of monthly tenancies, experience does not suggest that shop rents vary each month. Moreover, the behaviour of the parties has been in accordance with the view I take, namely, that the rent is fixed for some period of time at $650 and only subject to variation on some future occasion. For rent was paid and accepted without demur by either party at the rate of $650 a month for practically twelve months. It is therefore not now open to either party to contend that the rent fixed is uncertain from the outset, or has to be computed separately for each month, before there is any fixed rent for that month. Subsequent behaviour of both the parties specifically referable to the performance of a contract, occurring immediately after the contract is put into effect and before any dispute has arisen between the parties, must, from the point of view of commonsense, be the strongest evidence of what the parties intended in regard to a latent ambiguity of this nature in a written contract. That it is also legally admissible evidence for that purpose is well established on the highest authority. See *Watcham* v. *East Africa Protectorate.*[2]

For the foregoing reasons, I consider that the rent fixed in this agreement is not uncertain but was fixed at $650, at the outset, and the agreement includes a further provision for subsequent variation.

Indeed, the respondent never put forward any such contention in the court below and did not submit that the rent as provided for in the agreement was not certain. The judge has taken the point for the first time in his judgment without having had the benefit of argument from either party as to the intention of the agreement or the conduct of the parties. Nor was further argument sought when the point occurred to the judge. The respondent has thus been put in the position of having to support a judgment in her favour founded solely on a point she may never have wished to take. As the case was conducted in the court below, it turned solely (so far as the question of rent was concerned) on the extent by which the sum of $650 should be varied at that juncture, i.e. some two years after the term had commenced to run, and not on the question that the rent actually provided for was uncertain. According to the judge's notes, both counsel agreed in their closing addresses that the issues were:—

(a) Whether the court should order registration;

(b) Whether $715 is a fair current rent.

I now turn to the question whether this further provision is uncertain in its terms and, if so, whether that uncertainty is such that there should not be an order for specific performance.

The difficulties that have arisen in these proceedings have their origin in the fact that this provision does not specify how frequently the rent is to be reviewed, nor does it specify any procedure for determining the amount of the variation, if the parties fail to agree. The language used means, in my view, that the rent is to be varied whenever the market rental value of similar shophouses in the vicinity varies, and that the amount of the variation should be in accordance with the extent to which that market rental value changes. As I have said, experience does not indicate that changes in rents of this nature are of frequent occurrence. However, if either party considered the time had arrived when the amount of the rent should be varied under this provision and there was no agreement as to the new amount, the question might come before the court in several different ways. For instance, if the landlord considered the tenant had not paid, or tendered, the correct amount of rent having due regard to the operation of this provision, he could commence proceedings to evict the tenant for non-payment of rent in accordance with the lease or, if he endeavoured to evict the tenant without taking court proceedings, the tenant might bring proceedings for an injunction and/or damages in respect of the disturbance. The court would then have to determine what was the correct amount of the variation in accordance with this provision of

the agreement. Admittedly, this would be a very cumbersome method of varying the rent if the parties cannot agree, but the question at issue is whether the terms of the agreement are too uncertain to decree specific performance, not whether the method chosen by the parties is cumbersome. The question is purely one of fact and of evidence, and not as difficult to determine as many questions of fact that come before a court. Indeed, rent tribunals may have to fix rentals with less guidance than is given in this provision. The judge of the court below found it possible to obtain information himself as to current rents. It is difficult to imagine that it would not be possible, in the case of a modern commercial centre, as Jesselton is, to obtain evidence of shophouse rents in force at the time when the rent of this shophouse was fixed at $650 for the buildings in the same city block (or over a wider extent of Beach Street, if the parties thought the additional evidence of sufficient importance) and similar evidence as to what variation in these rents had subsequently taken place. From that evidence, and paying particular attention to the rent paid for "the shophouse adjoining" the premises, it should not be difficult to determine as a matter of fact what would be a reasonable variation in respect of these premises, and from what date the variation should be effective.

Even if a court was of opinion that this provision for variation is uncertain, or creates uncertainty, there would remain the question whether the uncertainty is of such a nature as would cause a court of equity to refrain from decreeing specific performance in the circumstances of this case. For specific performance will not always be denied because of some uncertainty in the terms of the contract. What then is the exact nature of the uncertainty which might be said to exist? The term of the lease is certain, there is apparently no uncertainty concerning the premises, the rent at the outset has been fixed, and paid and accepted by both parties. All that can be said, is that it is uncertain when the provision for variation will operate and what the actual amount of the variation is. Having regard to all that is provided for in the lease, I cannot regard these features as so fundamental as to deprive the appellant of a decree of specific performance, especially as he went into possession nearly three years ago and has apparently observed all the other provisions of the lease and is still in possession without any attempt by the landlord to evict him.

It has been said that, when there is uncertainty in a contract, a court of equity will not "make a contract" for the parties. On the other hand, when there has been part performance (and especially in cases where a tenant has gone into possession under an agreement to lease) a court of equity will not usually refuse to decree specific performance because of uncertainty as to some subsidiary matter, but will endeavour to give effect to the intention of the parties. See *Gregory* v. *Mighell*;[3] *Parker* v. *Taswell*;[4] *Sanderson* v. *Cockermouth & Workington Railway Co.*;[5] *Hart* v. *Hart*.[6] The first two of these authorities concerned contracts for a lease part-performed by the tenant going into possession, and the third concerned a contract for the purchase of land where the land had been conveyed and possession given. In *Parker* v. *Taswell*, the Lord Chancellor expressed himself on this aspect, as follows (at pp. 571 - 572) :—

> "The second objection which is made to a decree for specific performance is uncertainty in the terms of the agreement, and it is urged, that having regard to the principles on which a court of equity acts, it is impossible to decree specific performance of such an agreement as this....It must be borne in mind that this agreement has been partly executed by possession having been taken under it; and there are many authorities to shew that in such a case the court will strain its power to enforce a complete performance....The agreement, moreover, is admitted to be sufficiently certain as to all the substantial parts of it, and the only portions of it to which uncertainty is attributed are subordinate matters. No authority has been cited to shew that in such a case specific performance may not be decreed."

Four terms of a proposed lease were objected to as uncertain. The tenant had been in possession under the agreement for some two years before the proceedings came to a hearing. The Lord Chancellor considered that the clauses in question should be reasonably interpreted and, in two instances, that the word "etcetera" was capable of being construed with reasonable certainty by reference to "the custom of the country".

In *Gregory* v. *Mighell* the alleged uncertainty arose from the fact that the agreement for the lease fixed no specific rent but provided for a "fair and just annual rent" to be fixed by arbitration. The plaintiff was in possession for eight years before proceedings for ejectment were brought. The arbitrators chosen by the parties refused to proceed unless the parties executed arbitration bonds, which the defendant refused to do. In consequence, no rent had ever been fixed or paid, and the method chosen by the parties for fixing the rent had proved completely abortive. The Master of the Rolls, in disposing of the objection that this uncertainty as to rent justified refusal of a decree for specific performance, said (at pp. 333 - 334) :—

> "The non-payment of rent is accounted for by the circumstances, that the rent was not fixed in the manner stipulated by the agreement. After it was known, that the arbitrators had not fixed any rent, and that none of the other means, provided by the agreement, were resorted to, the defendant still acquiesced in the plaintiff's retaining possession of these lands. That is a case in which the failure of the arbitrators to fix the rent can never affect the agreement. It is in part performed;

and the court must find some means of completing its execution; as I have already said, the plaintiff is not to be considered as a trespasser. Some rent he must pay: the amount must be fixed in some other mode; and it seems to me, that it should be ascertained by the Master, without sending it to another arbitration; which might possibly end in the same way."

In *Sanderson's* case, the headnote gives a good summary of the circumstances creating the uncertainty and the manner in which the Master of the Rolls disposed of this aspect in ordering specific performance of the actual provision itself which contained the uncertainty. It reads as follows:—

"A railway company about to sever the plaintiff's land by their railroad, agreed to purchase the necessary portion of land, 'subject to the making such roads, ways, and slips for cattle, as might be necessary'. *Held*, that although it was very difficult to execute an agreement thus expressed, yet that the plaintiff was entitled to a specific performance — that the word 'necessary' must receive a reasonable interpretation. The expression was held to mean 'such roads, ways, and slips for cattle as might be necessary and proper for convenient communication between the severed portions of the plaintiff's land;' and a reference was therefore directed to ascertain what was necessary and proper."

The reference was again to the Master, unless the parties were able to suggest anything more satisfactory, but the plaintiff was held entitled to an order for specific performance by the company in regard to whatever facilities were determined after reference to come within this extended meaning given to the language used by the parties.

Hart's case is an illustration of those cases where an agreement provides for "usual" provisions and illustrates the well-established practice of the courts to give a meaning to that expression, whenever possible — generally by reference to the usual practice in the relevant field.

All these cases illustrate the length to which a court of equity will go in seeing that an agreement which is partly performed, should be fully carried out by both parties, notwithstanding uncertainty in the terms of the agreement, and the lengths to which such a court will go to resolve these uncertainties so that full performance can be ordered. The attitude of courts of equity in such circumstances, as illustrated by the authorities, is well summarised by Kay J. in *Hart's* case in these words:—

"Now....there has been a part performance of the agreement from the 14th day of February, 1880, down to this moment, because from that time to this no further proceedings have been taken in the divorce action. And I feel considerably impressed by the consideration which actuated the court in *Milnes* v. *Gery* and was expressed in very emphatic language by Lord Justice Turner in *Wilson* v. *West Hartlepool Railway Company* that when an agreement for valuable consideration between two parties has been partially performed, the court ought to do its utmost to carry out that agreement by a decree for specific performance. I think, if I do not misquote the words, Lord Justice Turner went as far as this: It is the duty of the court, as far as it is possible to do so, to ascertain the terms of the agreement, and to give effect to it. That is, as I understand, the rule of equity, that although there may be considerable vagueness in the terms, and although it may be such an agreement as the court would hesitate to decree specific performance of, if there had not been part performance, yet when there has been part performance the court is bound to struggle against the difficulty arising from the vagueness."

As I have already said, I do not consider that there is uncertainty as to what the parties have agreed to. It is the application of this agreement in practice that will cause, not lasting uncertainties, but uncertainty as to how frequently the current rent should be varied and how the amount of the variation is to be determined. If the parties can agree on each occasion, these uncertainties will not exist. If they cannot agree, then on that occasion there will be uncertainty until the matter is settled, probably, as in this instance, by being determined by the court in accordance with what this court holds to be the meaning of the provision for variation of the rent. That form of uncertainty exists whenever parties cannot agree and the matter must be settled by a court. Even if that is to be considered as creating uncertainty of the kind that existed in the authorities to which I have referred, I consider that these authorities fully support the view that such uncertainties would not warrant refusal of an order for specific performance on the facts before the court — where there has been substantial performance of the agreement, the parties have acted on it for so long, the appellant has established himself in business in these premises, and the respondent continues to acquiesce in his possession of the premises under the very agreement it is sought to enforce.

The difficulties in implementing this provision would be eliminated if the parties could agree to vary the agreement by providing that the rent should be reviewed, say, annually and the new rent fixed in accordance with any variation in prevailing rental values to be determined by reference to the rents of shophouses in Beach Street in the block in which the premises are situated at the beginning and end of the relevant period. It would also assist if the parties agreed to a further variation that, if the parties cannot agree on the new rent, it should be settled by reference to arbitration in some agreed manner. Such alterations would eliminate the difficulties in implementing this provision, but I cannot consider these difficulties to be such as to warrant refusing a decree for specific performance in existing circumstances.

On the hearing of the appeal, the respondent submitted that the agreement was not valid because of the provisions of section 88 of the Land Ordinance (Cap. 68). In ordering each

party to pay his own costs, the judge in the court below made this observation:—

"As to costs, it seems to me that both parties took the risk of entering into an agreement which was invalid under section 88 of Cap. 68 and therefore they are equally at fault."

Section 88 of the Land Ordinance reads as follows:—

"No new title and no dealing with, claim to or interest in any land except, land still held under native customary tenure without documentary title shall be valid until it has been registered in accordance with the provisions of this Part."

Part V of the Land Ordinance provides for a modified Torrens system of land registration in Sabah and this section corresponds to the provision necessary in this system to ensure that no title to interests in land shall pass until the dealing has been registered. The language employed is somewhat different from that used in the majority of systems in use in the Commonwealth. The usual provision is to the effect that no instrument shall be effectual to pass any interest in land without registration and that, upon registration, the interest shall pass. See section 27 of the Land Titles Ordinance, 1956, of Singapore for an illustration, and also the reference to the number of jurisdictions in which this provision exists set out in page 116 of *Hogg's* Registration of Title to Land Throughout the Empire. In nearly all jurisdictions, however, notwithstanding variations in the language used, it has been held that these provisions do not render unenforceable contracts or agreements which would lead up to the execution and registration of instruments. Even the unregistered instrument itself may give a title in equity and an equitable right to enforce the agreement which must have existed between the parties when the instrument was executed. See *Abigail* v. *Lapin.*[7] Section 4 of the Selangor Registration of Titles Regulation, 1891, employed what is probably the most sweeping language used in these provisions. That section provided that land comprised in a grant shall not be capable of being dealt with except in accordance with the statutory provisions and that "any attempt" to deal with land except in this manner "shall be null and void and of none effect". Nevertheless, in *Haji Abdul Rahman* v. *Mohamed Hassan,*[8] the Judicial Committee of the Privy Council held that an agreement, not in registrable form, to transfer back certain land upon a certain contingency happening, while "valueless as a transfer or burdening instrument," (p. 215) was good as a contract. It was said that it was not an "attempt to transfer, but a conditional promise to transfer." (p. 214).

The language of section 88 is not nearly as sweeping as that of the Selangor provision. Moreover, its effect is confined to a new title or a dealing with, claim to, or interest in land. Following the foregoing authorities, and others too numerous to mention, in my judgment section 88 does not affect contracts or agreements otherwise valid and enforceable. As was pointed out in *Abigail's* case (p. 500), the provision for protection of unregistered interests by caveats shows that the legislation does not attempt to render all unregistered interests non-existent. What it does, is to prohibit the acquisition of a legal estate or interest in land except by registration of an instrument in the statutory form. Section 116 of the Land Ordinance of Sabah makes the usual provision for caveats which may be registered "by any person claiming to be entitled to any interest" in any land. Obviously, such a provision is inconsistent with any interpretation of section 88 which involves holding that any agreements or other documents affecting land are of no effect and that only registration of the dealing in the land is to have legal validity at all.

For these reasons, I hold that section 88, notwithstanding the variation in language from that used in most jurisdictions, does not render this agreement for a lease invalid or unforceable.

Indeed, other considerations apart, the provisions of section 88 make it imperative in my view that there should be an order for specific performance, including an order that the respondent execute a registrable memorandum of sublease embodying the terms of the agreement and do all other acts necessary to enable registration to be effected. For, in this agreement, she has agreed to let these premises for fifteen years and, having regard to the provisions of section 88, the only manner in which the law of Sabah permits her to vest in the appellant the interest she has thus agreed to grant to him, is by doing those acts necessary to register the dealing.

Reference was also made in the course of argument to section 94 of the Ordinance, by virtue of which the appellant should have notified the Collector of Land Revenue that he had acquired possession of these premises. The collector may then call upon the parties to register the transaction and it is an offence not to notify the collector or to comply with his requirement to register, for which punishment is provided under the section. This provision is clearly designed to compel parties to keep the register up-to-date, but it provides its own penalty and has no effect on the contractual rights of the parties as between themselves. Nor does it prohibit late registration. In my judgment, neither this section, nor the failure to comply with it, affects the issue of specific performance having regard to all the facts relevant to that issue in this case.

The pleadings are not as precise as they

could have been, but the prayer in the statement of claim read with paragraph 3 of the reply amount, in my view, to a claim for an order for specific performance and for an order fixing the current rent. For the reasons already set out in this judgment, I would grant a decree for specific performance of the original agreement.

So far as fixing the current rent is concerned, these proceedings have gone astray. When the trial judge inspected the premises, he obtained information, apparently from persons outside the proceedings, and, in consequence, suggested to the parties that $715 was a fair rent. When the hearing was resumed, the plaintiff accepted this as a fair rent and closed his case. Whether it was these happenings that caused no evidence to be given on this issue other than that given by the appellant, I do not know, but it is obvious that there has been no proper trial of the issue. I would, therefore, refer this issue back to the court below to take such steps, in the event of the parties failing to agree on the current rent, as are necessary to enable the court to try this issue and determine what the current rent should be, having regard to the provision for variation of the rent set out in the agreement.

I would like to repeat what I have said previously about the desirability of the parties agreeing to an expanded provision in regard to the variation of rent. In the meantime, however, and failing such agreement, the sublease must follow the terms of the agreement signed between the parties and provide for a monthly rental of $650, with the provision for variation set out in the agreement.

Accordingly, I would allow this appeal with costs to the appellant, set aside the judgment of the court below, grant an order for specific performance of the original agreement and order a new trial on the question of what variation there should be in the rent of $650. The appellant should also have his costs of the proceedings to date in the court below.

Wee Chong Jin C.J. (Singapore) concurred.

Appeal allowed.

KIAN SENG & CO. v. BAN HIN LEE BANK LTD. & ORS.

[O.C.J. (Tan Ah Tah F.J.) February 12, 1964]

[Singapore — Suit No. 49 of 1960]

Landlord and Tenant—Oral tenancy—Tenancy of middle portion of building—Access to public road through adjacent owners' land—Blocking up of access—Whether right of way existed through front portion of building—Implied term in tenancy—Way of necessity.

The 1st defendants were the owners of the premises in question. The front portion of the premises was occupied by the 2nd defendants as a store and they had direct access to the public road. The plaintiffs who had entered into an oral tenancy agreement with the 1st defendants occupied the middle portion of the premises. The rear portion of the said premises was occupied by one LWP. Both the plaintiffs and LWP obtained access to their respective portions by means of a path which ran along the side of the premises. There were side doors in the middle and rear portions of the store which opened on to the path. In 1958 the City Council (who owned the land of which the path formed a part) blocked up the side doors. This completely deprived the plaintiffs of their means of access. The plaintiffs now sought a declaration that they had a right of way over the front portion of the building occupied by the 2nd defendants.

Held: in the circumstances of this case a term should be implied in the oral tenancy that the plaintiffs were to remain tenants of the 1st defendants so long as they could have access to the middle portion of the building by the path and through the side door. Accordingly the plaintiffs claim fails.

Observation on the law where such a term could not be implied.

Cases referred to:—

(1) *Dahl* v. *Nelson, Donkin & Co.* (1880), 6 App. Case 38.

(2) *Shirlaw* v. *Southern Foundries (1926) Ltd.* [1939] 2 K.B. 206.

(3) *Barry* v. *Haseldine* [1952] 1 Ch. 835 at p. 839.

ACTION.

L. Rayner for the plaintiffs.

A. P. Godwin for the 1st defendants.

R. Ramason for the 2nd defendants.

Cur. Adv. Vult.

Tan Ah Tah F.J.: In this action the plaintiffs ask for a declaration that they are entitled to a right of way over premises or land belonging to the first defendants. There are also claims for special damages and general damages.

The building with which this litigation is concerned is known as No. 18 North Boat Quay, Singapore. It is divided into three portions which for the sake of convenience will be referred to as the front portion, the middle portion and the rear portion.

On the 16th July 1956 Chua Lian Teng, a partner in the plaintiff firm, went to see Yeap Lean Seng of the first defendant bank with a view to renting the middle portion. After a brief conversation, Chua Lian Teng was given a key and went to inspect the premises. After he had inspected the premises he went back to see Yeap Lean Seng. The rent was thereupon agreed at the sum of $100 per mensem. Chua Lian Teng paid the first month's rent and was given a receipt. He informed Yeap Lean Seng that he wanted to use the place as a store. There was no discussion regarding the terms of the tenancy beyond the fixing of the rent at $100 per mensem. No tenancy agreement was drawn up.